



DELAWARE RIVER BASIN COMMISSION

18 CFR Part 401

Amendments to the Rules of Practice and Procedure to Allow Each Signatory Party and the Commission to Administer a Single Process for the Review and Adjudication of Projects

AGENCY: Delaware River Basin Commission.

ACTION: Final rule.

SUMMARY: The Delaware River Basin Commission is amending its regulations to provide for the One Process/One Permit Program. The Program is intended to promote interagency cooperation and collaboration on shared mission objectives, achieve regulatory program efficiencies, avoid unnecessary duplication of effort, and reduce the potential for confusion on the part of regulated entities and the public regarding regulatory requirements applicable to projects.

DATES: This final rule will be effective [INSERT DATE 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Technical information: David Kovach, 609-477-7264. Legal information: Pamela Bush, 609-477-7203.

SUPPLEMENTARY INFORMATION:

Background

The Delaware River Basin Commission (“DRBC” or “Commission”) is a federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states – Delaware, New Jersey, New York and Pennsylvania – and the North Atlantic Division Commander of the U.S. Army Corps of Engineers, representing the federal government.

Specifically, this final rule amends subchapter A—Administrative Manual, part 401—Rules of Practice and Procedure, subpart C—Project Review Under Section 3.8 of the Compact by the addition of a new section 401.42, providing for DRBC and each of the parties to the Delaware River Basin Compact (United States Public Law 87-328, Approved September 27, 1961, 75 U.S. Statutes at Large 688; 53 Delaware Laws, Chapter 71, Approved May 26, 1961; New Jersey Laws of 1961, Chapter 13, Approved May 1, 1961; New York Laws of 1961, Chapter 148, Approved March 17, 1961; and Pennsylvania Acts of 1961, Act No. 268, Approved July 7, 1961 (“the Compact”)) – Delaware, New Jersey, New York, Pennsylvania and the federal government (“Signatory Parties”) – to coordinate and collaborate in the administration of a single process for the review and adjudication of certain projects, including, where appropriate, issuance of a single permit or other approval instrument.

Currently, the sponsors of many water resource-related projects in the Delaware River Basin are required to apply to both the DRBC and a state agency, among others, for approvals. New section 401.42 provides for the DRBC and the administrative agencies of the Signatory Parties to identify regulatory programs that by mutual agreement will be managed through a single process that may result in one decision or approval. The program, known as One Process/One Permit (hereinafter, “the Program or “One Permit”) is intended to promote

interagency cooperation and collaboration on shared mission objectives, achieve regulatory program efficiencies, avoid unnecessary duplication of effort, and reduce the potential for confusion on the part of regulated entities and the public regarding regulatory requirements applicable to projects. Importantly, the rule expressly preserves the authorities of the DRBC and each of its Signatory Parties and effects no change to federal, state or DRBC substantive standards and requirements.

In accordance with this final rule, administrative agreements between DRBC and Signatory Party agencies to implement the Program may be approved by the Commission after each such agreement undergoes a duly noticed public hearing. In accordance with Resolution No. 2015-4 of the Commission, which was adopted on March 11, 2015 following a public hearing on March 10, 2015, an administrative agreement between the DRBC and the New Jersey Department of Environmental Protection (NJDEP) was executed, in part to demonstrate how the Program would operate in New Jersey. With adoption of the final rule, DRBC and NJDEP will fully implement their March 2015 agreement.

Notably, each Signatory Party may choose whether and when to initiate an agreement or agreements with DRBC under the Program. No draft agreements with Signatory Party agencies other than the NJDEP to implement the Program have yet been published for comment.

Procedural Background

The Commission introduced One Permit to the basin community during meetings with regulated entities, environmental organizations and other stakeholders on February 12 and March 3, 2015 and through publication on the DRBC website of a press release and a set of FAQs on February 27, 2015. During the Commission's quarterly public meeting on March 10-11, 2015, the Commission approved Resolution No. 2015-4, in part authorizing and directing the Executive Director to initiate rulemaking to amend DRBC's Rules of

Practice and Procedure to provide specific authorization for and define the scope of the Program. Notice of the proposed amendments was published on the Commission's web site on May 17, 2015.

Notice of the proposed amendments also appeared in the Federal Register at 80 FR 28567, May 19, 2015; in the Delaware Register of Regulations, 18 DE Reg. 1002, June 1, 2015; New Jersey Register, 47 N.J.R. 1256, June 1, 2015; New York State Register, May 27, 2015 (page 4); and Pennsylvania Bulletin, 45 Pa. B. 2611, May 30, 2015. The Commission held a public hearing on the proposal on June 9, 2015 and accepted written comments on the rule through July 1, 2015.

Rule Highlights

Notable aspects of the final rule include the following:

- Section 401.42(b) provides that applications for approvals required by the Compact and Commission regulations, but not within the scope of the Program, must continue to be submitted to the Commission.
- To ensure continued public access to information on the status of all projects under review pursuant to the Delaware River Basin Compact, including those administered under One Permit, § 401.42(d)(2)) establishes that participating Signatory Party agencies will notify DRBC at least once monthly of applications received under the Program; and § 401.42(d)(5)) establishes that the list that the Commission will maintain of projects being administered under One Permit will be posted on the Commission's website.
- Section 401.42(h) provides that DRBC's current Project Review Fee Schedule as set forth in Resolution No. 2009-2 will be the operative fee schedule for projects reviewed under the Program.

- Section 401.42(i) provides mechanisms for the efficient disposition of Commission dockets during the transition to One Permit. Section 401.42(i)(1) provides that for projects covered by the Program, the most recent docket will be deemed administratively continued when a renewal application is timely submitted to the Signatory Party Agency. Section 401.42(i)(2) provides that unless the Executive Director or the Commission otherwise directs, upon the Signatory Party Agency's final action on an application for a project subject to the Program, (a) any existing or administratively continued docket will terminate as to all of its provisions and conditions within the scope of the Signatory Party Agency approval; and (b) such docket will continue in effect as to any provisions and conditions outside the scope of the Signatory Party Agency approval, including for example, addition of a project to the Comprehensive Plan.

- The rule authorizes Signatory Party agencies, in accordance with an applicable administrative agreement, to issue in their approvals for projects to be administered under the Program the finding and determination required by section 3.8 of the Compact that a project subject to section 3.8 review does not substantially impair or conflict with the Commission's Comprehensive Plan ("the finding"). Section 401.42(d)(4) makes clear that where in accordance with an applicable administrative agreement implementing One Permit the finding continues to be made by the Commission, the Signatory Party agency may include the Commission's finding in the agency's approval, together with any conditions identified by the Commission as necessary to support it, thereby achieving a unified permit.

- The final rule also makes clear (1) that participation in the program by Signatory Party agencies is voluntary; and (2) that the scope of a Signatory Party Agency's participation is defined by an administrative agreement between DRBC and the agency that has been duly adopted in accordance with § 401.42(d).

Additional materials.

Additional materials can be found on the Commission's web site at www.drbc.net. These include DRBC Resolution No. 2015-9 approving the final rule, at http://www.nj.gov/drbc/library/documents/Res2015-09_OPOPwith-final-rule-text.pdf; and the Commission's detailed comment and response document, which identifies commenters, summarizes comments received on the proposal, and sets forth the Commission's responses, at http://www.nj.gov/drbc/library/documents/OPOP/comment-and-response_OPOP.pdf. The version of the Rules of Practice and Procedure that is currently posted on DRBC's website at http://www.nj.gov/drbc/library/documents/admin_manual.pdf uses DRBC's original numbering system, which is different from that of the CFR. In the original system, the One Permit Program rules are set forth at new section 2.3.11. A list of the CFR units and corresponding DRBC units follows. A complete stand-alone version of the Rules of Practice and Procedure using the CFR system will be available on the DRBC website shortly.

<u>CFR Unit</u>	<u>DRBC Unit</u>	<u>Title or Caption</u>
Title 18 Conservation of Power and Water Resources	—	—
Chapter III— Delaware River Basin Commission	—	—
Subchapter A— Administrative Manual	Administrative Manual [Part II]	—
Part 401—Rules of Practice and Procedure	Rules of Practice and Procedure	—

<u>CFR Unit</u>	<u>DRBC Unit</u>	<u>Title or Caption</u>
Subpart C—Project Review Under Section 3.8 of the Compact	Article 3 – Project Review Under Section 3.8 of the Compact	—
401.42	2.3.11	One Permit Program
401.42(a)	2.3.11 A.	Purpose
401.42(b)	2.3.11 B.	Scope
401.42(c)	2.3.11 C.	Regulatory programs
401.42(d)	2.3.11 D.	Procedure
401.42(e)	2.3.11 E.	Comprehensive Plan projects
401.42(f)	2.3.11 F.	Retention of Commission review and enforcement authorities
401.42(g)	2.3.11 G.	Exhaustion of Signatory Party administrative remedies prerequisite to appeal
401.42(h)	2.3.11 H.	Fees
401.42(i)	2.3.11 I.	Effect of One Permit Program on Commission dockets
401.42(j)	2.3.11 J.	Modification of Rules of Practice and Procedure to conform to this section
401.42(k)	2.3.11 K.	No interference with Supreme Court decree

Administrative practice and procedure, Project review, Water pollution control, Water resources.

For the reasons set forth in the preamble, the Delaware River Basin Commission amends part 401 of title 18 of the Code of Federal Regulations as follows:

PART 401 – RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 401 continues to read as follows:

Authority: Delaware River Basin Compact (75 Stat. 688), unless otherwise noted.

Subpart C – Project Review Under Section 3.8 of the Compact

2. Add § 401.42 to read as follows:

§ 401.42 One Permit Program.

(a) Purpose. The purpose of the One Permit Program set forth in this section is to provide the opportunity for the environmental agency and/or other administrative agency of a Signatory Party (“Signatory Party Agency”) and the Commission to coordinate and collaborate in the administration of a single process for the review and adjudication of projects. The One Permit Program allows the Signatory Party Agency and Commission to incorporate requirements and determinations of both entities in a single permit or other approval instrument, pursuant to a duly adopted Administrative Agreement under paragraph (d) of this section.

- (b) Scope. This section applies to all projects that:

(1) Are reviewable under the Compact;

(2) Meet the thresholds for review set forth in § 401.35 of these Rules of Practice and

Procedure;

(3) Are subject to review by a Signatory Party Agency under its own statutory authorities; and

(4) Are within regulatory programs that have been identified in a duly adopted Administrative Agreement between the Commission and a Signatory Party Agency under this section. For any project that requires an approval under the Compact that is outside the scope of the Signatory Party Agency's approval issued in accordance with an Administrative Agreement under this section, the project sponsor shall apply to the Commission in accordance with procedures established by the Commission.

(c) Regulatory programs. Regulatory programs eligible for administration under the One Permit Program may include but are not limited to those concerning: Basin discharges, Basin water withdrawals, and Basin flood plain requirements.

(d) Procedure. The categories of projects covered and the procedures for processing applications under the One Permit Program shall be set forth in one or more Administrative Agreements between the Commission and the Signatory Party Agency that have been adopted by the Commission following a duly noticed public hearing and are in form and substance acceptable to the Commission and the Signatory Party Agency, consistent with the following:

(1) Except as provided in paragraphs (b) and (e) of this section or in an Administrative Agreement that has been duly executed by the Commission and the Signatory Party Agency under this section, an application for initial approval, renewal or revision of any project subject to the One Permit Program shall be filed only with the Signatory Party Agency.

(2) To enable the Commission to compile and make available to the public a current list of pending applications for projects within the Basin subject to Commission jurisdiction, the Signatory Party Agency shall notify the Commission at least monthly of

applications the Signatory Party has received during the preceding month that may be eligible for review under the One Permit Program.

(3) For those categories of projects identified in the Administrative Agreement as requiring Commission input, the Commission staff shall provide the Signatory Party Agency with such input, including where specified by the Administrative Agreement, a recommendation as to any conditions of approval that may be necessary or appropriate to include in the project review determination under Section 3.8 of the Compact as to those regulatory programs identified in an Administrative Agreement in accordance with paragraph (b) of this section.

(4) Unless the Signatory Party Agency disapproves the project or the Administrative Agreement provides for separate Commission action under Section 3.8 of the Compact, the Signatory Party Agency shall make the project review determination under Section 3.8 of the Compact, as specified in the Administrative Agreement, as to the regulatory program covered by the Signatory Party Agency's approval and include the determination and any associated conditions of approval within the permit or other approval instrument that it issues to the project sponsor. If in accordance with the applicable Administrative Agreement the determination under Section 3.8 of the Compact is made by the Commission, the Signatory Party Agency may include the determination together with any associated conditions of approval in its permit or other approval instrument covering the project.

(5) The Commission will maintain on its website a list of all projects being administered pursuant to the Program.

(e) Comprehensive Plan projects. Articles 11 and 13 of the Compact require certain projects to be included in the Comprehensive Plan. To add a project not yet included in the Comprehensive Plan, the project sponsor shall submit a separate application to the

Commission. If following its review and public hearing the Commission approves the addition of the project to the Comprehensive Plan, the Commission's approval will include such project requirements as are necessary under the Compact and Commission regulations. All other project approvals that may be required from the Signatory Party Agency or the Commission under regulatory programs administered pursuant to this section may be issued through the One Permit Program. An application for renewal or modification of a project in the Comprehensive Plan that does not change the project so substantially as to render it a new and different project may be submitted only to the Signatory Party Agency unless otherwise specified in the Administrative Agreement.

(f) Retention of Commission review and enforcement authorities. Notwithstanding any other provision of this section, any Commissioner or the Executive Director may designate for Commission review any project that is reviewable under the Compact. Nothing in this section shall limit the authority of the Commission to exercise its review authority under the Compact and applicable Commission regulations. Similarly, although Administrative Agreements executed pursuant to this section may include collaborative and cooperative compliance and enforcement procedures, nothing in this section shall limit the authority of the Commission to exercise its enforcement authority under the Compact and applicable regulations.

(g) Exhaustion of Signatory Party administrative remedies prerequisite to appeal. Before commencing an action in a court of appropriate jurisdiction challenging any final action taken by a Signatory Party Agency under this section, the appellant must first exhaust its administrative remedies under the law of the Signatory Party whose agency issued the decision at issue.

(h) Fees. The Commission shall establish and maintain a schedule of fees for any or all of the services it renders pursuant to this section. The applicable fee(s) for Commission

services rendered pursuant to this section shall be those set forth in DRBC Resolution No. 2009-2 (available at <http://www.nj.gov/drbc/library/documents/Res2009-2.pdf>) for the review and renewal of project approvals. Project sponsors shall pay such fees, if any, directly to the Commission in accordance with the current schedule and applicable rules.

(i) Effect of One Permit Program on Commission dockets.

(1) Unless the Executive Director or Commission otherwise directs, if a docket holder submits, or has submitted, a timely application to a Signatory Party Agency for a project subject to review under an Administrative Agreement duly adopted under paragraph (d) of this section, the most recent docket for the project shall, upon expiration, be deemed administratively continued until final action is taken in accordance with paragraph (i)(2) of this section.

(2) Unless the Executive Director or Commission otherwise directs, upon a Signatory Party Agency's final action on an application for a project subject to the One Permit Program:

(i) Any existing or administratively continued docket for such project shall terminate as to all of its provisions and conditions that pertain to regulatory programs administered by the Signatory Party Agency under the Administrative Agreement ("the Covered Programs"); and

(ii) The docket shall continue in effect as to any provisions and conditions not pertaining only to Covered Programs, including, as applicable, the incorporation of the project in the Commission's Comprehensive Plan.

(j) Modification of rules of practice and procedure to conform to this section. Any project subject to review under an Administrative Agreement duly adopted under paragraph (d) of this section, shall be governed by this section and not §§ 401.4, 401.5, 401.6, 401.8,

401.34(a), (c) and (e), 401.37, 401.38 and 18 CFR part 401, subpart F, where they are inconsistent with the procedures provided in this section.

(k) No interference with Supreme Court decree. In accordance with Sections 3.3(a) and 3.5 of the Compact, nothing in this section shall grant the authority to any Signatory Party Agency to impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations and provisions for administration thereof provided in the United States Supreme Court decree in New Jersey v. New York, 347 U.S. 995 (1954) (“Decree”). Any such action shall be taken only by the Commission with the unanimous consent of the parties to the Decree or upon unanimous consent of the members of the Commission following a declaration of a state of emergency in accordance with Section 3.3(a) of the Compact.

Dated: January 15, 2016

PAMELA M. BUSH

Commission Secretary and Assistant General Counsel

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